No. 10048

United States

Circuit Court of Appeals

For the Ninth Circuit.

CONSOLIDATED TIMBER COMPANY,
a corporation,
Appellant,

vs.

IVAN WOMACK,
Appellee.

IVAN WOMACK,
Appellant,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

HART, SPENCER, McCULLOCH & ROCKWOOD, PHILIP CHIPMAN,
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Portland, Oregon; and

ROBERT W. MAXWELL,
354 Stuart Building,
Seattle, Washington,
for Appellant and Cross-Appellee.

GREEN & LANDYE,
1003 Corbett Building,
Portland, Oregon,
for Appellee and Cross-Appellant.

In the District Court of the United States
for the District of Oregon

November Term, 1940.

Be it remembered, that on the 19th day of November, 1940, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:

[1*]

In the District Court of the United States
for the District of Oregon

IVAN WOMACK,

Plaintiff,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for a first cause of action against the defendant complains and alleges:

I.

That plaintiff brings this action under and by virtue of an act of the Congress of the United States for the regulation of commerce among the states, to-wit, the Fair Labor Standards Act of 1938 (29 U. S. C. A., paragraphs 201-219, inclusive), as hereinafter more fully appears.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

That at all times herein mentioned defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the state of Oregon, with its principal office and place of business located in the city of Portland, in said state; that during all said times defendant owned, maintained and operated, as it now does, a certain logging camp for the manufacture of timber into sawlogs, which said logging camp is, and was during all times herein mentioned, located near the town of Forest Grove in said state of Oregon; that said logs manufactured by defendant in its said logging camp, aforesaid, were during all times herein mentioned, and now are, sold and shipped by means of railroad and water transportation to various and sundry sawmills located in the state of [2] Oregon and adjacent states; that substantially all of said logs so manufactured by defendant or the lumber subsequently manufactured from said logs was at all times herein mentioned, and now is, shipped to states other than the state of Oregon, and said defendant during all said times herein mentioned was and now is engaged in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938, and was and is subject to all the terms and provisions thereof.

III.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the

present time, said defendant owned, maintained and operated a certain cook house in its said logging camp, aforesaid, which said cook house was maintained and operated in conjunction with said defendant's logging operation; that said cook house was at all times herein mentioned, and now is, an integral, necessary and indispensable part of said logging operations of defendant, aforesaid, and is and was at all times herein mentioned integrally, necessarily and indispensably connected with defendant's production of logs in said logging camp.

IV.

That during all times herein mentioned, particularly subsequent to October 24, 1938, and to the present time, plaintiff was and is employed by said defendant as a baker in said cook house maintained by said defendant in its said logging camp aforesaid; that plaintiff's duties in said logging camp consisted and do now consist of cooking and baking for loggers and other employees employed by said defendant in said logging camp aforesaid; that plaintiff during all said times was engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of the Fair Labor Standards Act of 1938; that during all said times, [3] and for a long time prior thereto, plaintiff was and now is employed by said defendant upon a monthly basis at the regular rate of wages of $125.00 per month, plus board and room; that said board and room during all said times was of the reason-

able and agreed value of $45.00 per month; that plaintiff was working, therefore, during all of said times at a regular monthly wage, in the aggregate, of $170.00 per month; that between the dates of October 30, 1938, and May 20, 1939, plaintiff was required by defendant in his said employment to work a total of 382 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit A and by this reference made a part of this complaint as though set forth hereat verbatim; that plaintiff received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that plaintiff often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, plaintiff is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of $129.15, as appears more particularly from said Exhibit A hereto, in which said amount defendant is indebted to plaintiff by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, de-

fendant has compelled plaintiff to work in excess of 42 hours per week, and since October 23, 1940, plaintiff has been compelled to work in excess of 40 hours per week, and plaintiff is therefore entitled to overtime at time and [4] one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that plaintiff does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

V.

That in addition to said unpaid wages of $129.15, as hereinbefore set forth, plaintiff is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half times the plaintiff's regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, plaintiff is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of $387.47.

VI.

That plaintiff has been compelled to employ attorneys to prosecute his claim for wages and liqui-

dated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of $175.00.

For a second cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein. [5]

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Robert Vandehey was and now is employed by said defendant as a dish washer in said cook house maintained by said defendant in its said logging camp aforesaid; that said Robert Vandehey was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of the Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Robert Vandehey was and now is employed by said defendant upon a monthly basis at the regular rate of wages of $85.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of $45.00 per month, and said Robert Vandehey was working, therefore, dur-

ing all of said times at a regular monthly wage, in the aggregate, of $130.00 per month; that between the dates of October 30, 1938, and August 19, 1939, said Robert Vandehey was required by defendant in his said employment to work a total of 440½ hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit B and by this reference made a part of this complaint as though set forth hereat verbatim; that Robert Vandehey received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that said Robert Vandehey often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of [6] said act; that by reason thereof, said Robert Vandehey is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of $113.35, as appears more particularly from said Exhibit B hereto, in which said amount defendant is indebted to said Robert Vandehey by reason of said facts aforesaid; that

betweeen August 1, 1940, and October 23, 1940, defendant has compelled said Robert Vandehey to work in excess of 42 hours per week, and since October 24, 1940, said Robert Vandehey has been compelled to work in excess of 40 hours per week, and said Robert Vandehey is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Robert Vandehey does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of $113.35, as hereinbefore set forth, said Robert Vandehey is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half times his regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, said Robert Vandehey is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of $340.17.

IV.

That prior to the commencement of this action, said Robert [7] Vandehey has assigned all his claims for overtime against defendant to plaintiff; that plaintiff has been designated by said Robert Vandehey as the agent and representative of said Robert Vandehey to maintain such action for and on his behalf; that said Robert Vandehey is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorney's fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of $150.00. [8]

For a third cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein.

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Marion B. Vandehey was and now is

employed by said defendant as a dish washer in said cook house maintained by said defendant in its said logging camp aforesaid; that said Marion B. Vandehey was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Marion B. Vandehey was and now is employed by said defendant upon a monthly basis at the regular rate of wages of $85.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of $45.00 per month, and said Marion B. Vandehey was working, therefore, during all of said times at a regular monthly wage, in the aggregate, of $130.00 per month; that between the dates of October 30, 1938, and May 26, 1939, said Marion B. Vandehey was required by defendant in his said employment to work a total of 62 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit C and by this reference made a part of this complaint as though set forth hereat verbatim; that said Marion B. Vandehey received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said [9] defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly

rate as above set forth; that said Marion B. Vandehey often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, said Marion B. Vandehey is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of $20.40, as appears more particularly from said Exhibit C hereto, in which said amount defendant is indebted to said Marion B. Vandehey by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, defendant has compelled said Marion B. Vandehey to work in excess of 42 hours per week, and since October 24, 1940, said Marion B. Vandehey has been compelled to work in excess of 40 hours per week, and said Marion B. Vandehey is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Marion B. Vandehey does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of $20.40, as hereinbefore set forth, said Marion B. Vandehey is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half [10] times his regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, said Marion B. Vandehey is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of $61.22.

IV.

That prior to the commencement of this action, said Marion B. Vandehey has assigned all his claims for overtime against defendant to plaintiff; that plaintiff has been designated by said Marion B. Vandehey as the agent and representative of said Marion B. Vandehey to maintain such action for and on his behalf; that said Marion B. Vandehey is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other of plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a

reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of $25.00.

For a fourth cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein.

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Floyd [11] Calloway was and now is employed by said defendant as a kitchen helper in said cook house maintained by said defendant in its said logging camp aforesaid; that said Floyd Calloway was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Floyd Calloway was and now is employed by said defendant upon a monthly basis at the regular rate of wages of $85.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of $45.00 per month, and said Floyd Calloway was working, therefore, during all of said times at a regular monthly wage, in the aggregate, of $130.00 per month; that

between the dates of October 30, 1938, and May 20, 1939, said Floyd Calloway was required by defendant in his said employment to work a total of 228 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit D and by this reference made a part of this complaint as though set forth hereat verbatim; that said Floyd Calloway received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that said Floyd Calloway often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, said Floyd Calloway is entitled to have and receive of defendant as wages, in accordance with the terms [12] and provisions of said act aforesaid, for said excess hours worked the sum of $57.65, as appears more particularly from said Exhibit D hereto, in which said amount defendant is indebted to said Floyd Calloway by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, defendant has compelled said Floyd Calloway to work in excess of 42

hours per week, and since October 24, 1940, said Floyd Calloway has been compelled to work in excess of 40 hours per week, and said Floyd Calloway is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Floyd Calloway does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of $57.65, as hereinbefore set forth, said Floyd Calloway is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half times his regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, said Floyd Calloway is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of $173.06.

IV.

That prior to the commencement of this action, said Floyd Calloway has assigned all his claims for

overtime against defendant to plaintiff; that plaintiff has been designated by said Floyd Calloway as the agent and representative of said Floyd Calloway to maintain [13] such action for and on his behalf; that said Floyd Calloway is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other of plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of $85.00. [14]

For a fifth cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein.

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Charles Chapman was and now is employed by said defendant as second cook in said cook house maintained by said defendant in its said logging camp aforesaid; that said Charles Chap-

man was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Charles Chapman was and now is employed by said defendant upon a monthly basis at the regular rate of wages of $125.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of $45.00 per month, and said Charles Chapman was working, therefore, during all of said times at a regular monthly wage, in the aggregate of $170.00 per month; that between the dates of October 30, 1938, and June 10, 1939, said Charles Chapman was required by defendant in his said employment to work a total of 460 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit E and by this reference made a part of this complaint as though set forth hereat verbatim; that said Charles Chapman received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to [15] work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that said Charles Chapman often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair

Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, said Charles Chapman is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of $163.78, as appears more particularly from said Exhibit E hereto, in which said amount defendant is indebted to said Charles Chapman by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, defendant has compelled said Charles Chapman to work in excess of 42 hours per week, and since October 24, 1940, said Charles Chapman has been compelled to work in excess of 40 hours per week, and said Charles Chapman is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Charles Chapman does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of $163.78, as hereinbefore set forth, said Charles Chapman is

entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to [16] one and one-half times his regular rate of pay for all work performed in excess of said 44 hours per week between dates of October 28, 1938, and May 20, 1939; that is to say, said Charles Chapman is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of $491.42.

IV.

That prior to the commencement of this action, said Charles Chapman has assigned all his claims for overtime against defendant to plaintiff; that plaintiff has been designated by said Charles Chapman as the agent and representative of said Charles Chapman to maintain such action for and on his behalf; that said Charles Chapman is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other of plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of $225.00. [17]

Wherefore, plaintiff prays for judgment against the defendant on his first cause of action in the sums of One Hundred Twenty-nine and 15/100 ($129.15) Dollars and Three Hundred Eighty-seven and 47/100 ($387.47) Dollars, liquidated damages, and One Hundred Seventy-five ($175.00) Dollars, attorneys' fees; on his second cause of action in the sums of One Hundred Thirteen and 35/100 ($113.35) Dollars and Three Hundred Forty and 17/100 ($340.17) Dollars, liquidated damages, and One Hundred Fifty ($150.00) Dollars, attorneys' fees; on his third cause of action in the sums of Twenty and 40/100 ($20.40) Dollars and Sixty-one and 22/100 ($61.22) Dollars, liquidated damages, and Twenty-five ($25.00) Dollars, attorneys' fees; on his fourth cause of action in the sums of Fifty-seven and 65/100 ($57.65) Dollars and One Hundred Seventy-three and 06/100 ($173.06) Dollars, liquidated damages, and Eighty-five ($85.00) Dollars, attorneys' fees; on his fifth cause of action in the sums of One Hundred Sixty-three and 78/100 ($163.78) Dollars and Four Hundred Ninety-one and 42/100 ($491.42) Dollars, liquidated damages, and Two Hundred Twenty-five ($225.00) Dollars, attorneys' fees; and for his costs and disbursements incurred herein.

GREEN, BOESEN & LANDYE
Attorneys for Plaintiff.

State of Oregon
County of Multnomah—ss.

I, Ivan G. Womack, being first duly sworn, depose and say that I am the plaintiff in the above entitled cause; and that the foregoing complaint is true as I verily believe.

IVAN G. WOMACK

Subscribed and sworn to before me this 9th day of November, 1940.

(Seal) JAMES LANDYE

My Commission expires December 15, 1943.

[Endorsed]: Filed November 12, 1940. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [18]

And afterwards, to wit, on the 5th day of December, 1940, there was duly filed in said Court, an answer in words and figures as follows, to wit: [19]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named and for answer to the plaintiff's first cause of action admits, denies and alleges as follows:

I.

Defendant admits the allegations of paragraph I of the first cause of action, that this is an action brought under and by virtue of an act of Congress.

II.

In answer to paragraph II of plaintiff's first cause of action, defendant admits and alleges that at all times mentioned in the complaint defendant was and is a corporation organized and existing under and by virtue of the laws of the State of Michigan and qualified to do business in the State of Oregon engaged in the business of logging, operating and maintaining a logging camp in the State of Oregon, located near Forest Grove, Oregon; that the logs cut by defendant from property owned or logged by defendant in the course of its business are sold entirely within, and are delivered to the purchasers thereof within, the State of Oregon; that most of the logs are ultimately sawed into lumber by the purchasers thereof in mills located within the State of Oregon, a sub- [20] stantial percentage of which lumber moves ultimately in interstate commerce to points outside the State of Oregon. Except as above admitted, defendant denies all of the allegations contained in paragraph II of the first cause of action.

III.

In answer to paragraph III of plaintiff's first cause of action, defendant admits and alleges that at all times mentioned in plaintiff's complaint up to and including June 28, 1940, it owned, maintained and operated a cookhouse located at Glenwood, Oregon; that said cookhouse was operated as a restaurant for the use and benefit of defendant's employees

and of others not employed by defendant; that said cookhouse or restaurant was maintained and operated in a separate building, no part of which was used by the defendant in the production of logs; that in addition to defendant's cookhouse or restaurant there were other facilities in or about Glenwood, Oregon, for securing food, available to defendant's employees and others; that after June 10, 1940, defendant opened and has since operated a cookhouse at a point known as Camp Two, located approximately 17 miles from Glenwood; that said cookhouse is maintained and operated by the defendant in a separate building, no part of which is used by the defendant in the production of logs; that since said cookhouse has been removed to Camp Two, it is practically the only facility for employees and others to obtain food at Camp Two; that defendant does not require its employees to use the facilities of said cookhouse; that some of defendant's employees commute to and from their work and do not make use of said cookhouse; that at all times mentioned in the complaint, said cookhouses were owned, maintained and operated by defendant as separate establishments and not as parts of defendant's [21] principal business of logging; that defendant does not require its employees to make use of said facilities; that defendant's employees engaged in the cutting of logs from standing timber and transporting said logs from the woods to the point where said logs are sold to customers are paid

wages at fixed rates and that such employees as do make use of defendant's cookhouse or restaurant facilities pay for the food sold and service rendered to them by said cookhouse or restaurant at agreed rates per meal; and that the food and services available through the said cookhouses or restaurants are purchased in small quantities by defendant's employees and others for their private consumption and use and are in no sense for industrial or business purposes. Except as above admitted, defendant denies all of the allegations of paragraph III of the first cause of action.

IV.

In answer to paragraph IV of plaintiff's first cause of action, defendant admits and alleges that since October 24, 1938, and to the present time, plaintiff was and now is employed by the defendant in said cookhouse or restaurant as a baker, engaged in preparing food for sale to defendant's employees and others; and that said food was prepared and sold to such persons for consumption. Defendant denies that at any time mentioned in plaintiff's complaint plaintiff has been engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (52 Statutes at Large 1060, 29 U. S. C. A. Sections 201-219). Defendant admits that plaintiff has been and now is employed at an agreed monthly salary of $125.00 per month, plus board and room. Defendant admits that the plaintiff has in some weeks worked in excess of 44 hours, 42 hours or 40 hours, respectively,

as alleged [22] in plaintiff's complaint, but defendant has no knowledge upon which to form a belief as to the exact number of hours worked and, therefore, denies that plaintiff has worked the number of hours as alleged in his complaint and set forth in Exhibit A. Defendant denies that plaintiff's employment is governed by the said Fair Labor Standards Act of 1938, but alleges that if such employment is within said Act, said employment is specifically exempted by Section 13 a (2) of the said Act which provides that "Section 6 and 7 (the minimum wage and maximum hour provisions) shall not apply with respect to . . . (a) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce," in that plaintiff's employment as a baker in defendant's cookhouse or restaurant is employment in a "retail or service establishment," all of the selling or servicing therein being in intrastate commerce, as the food prepared by plaintiff is sold and served to ultimate consumers solely within the State of Oregon. Except as above admitted, defendant denies each and every allegation in paragraph IV of plaintiff's complaint.

V.

In answer to paragraphs V and VI of plaintiff's first cause of action, defendant denies each and every allegation therein contained.

For answer to the second cause of action set forth in plaintiff's complaint, defendant admits that Rob-

ert Vandehey was and now is employed by defendant as a dishwasher in defendant's cookhouse or restaurant; that said Robert Vandehey was paid by defendant upon a monthly basis at the regular rate of $85.00 per month, plus room and board, and that Robert [23] Vandehay has assigned his claim, as set forth in said second cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the second cause of action.

For answer to the third cause of action set forth in plaintiff's complaint, defendant admits that Marion B. Vandehey was and now is employed by defendant as dishwasher in defendant's cookhouse or restaurant; that said Marion B. Vandehey was paid by defendant upon a monthly basis at the regular rate of $85.00 per month, plus room and board, and that Marion B. Vandehey has assigned his claim, as set forth in said third cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the third cause of action.

For answer to the fourth cause of action set forth in plaintiff's complaint, defendant admits that Floyd Calloway was and now is employed by defendant as a kitchen helper in defendant's cookhouse or restaurant; that said Floyd Calloway was paid by defendant upon a monthly basis at the reg-

ular rate of $85.00 per month, plus room and board, and that said Floyd Calloway has assigned his claim, as set forth in said fourth cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the fourth cause of action. [24]

For answer to the fifth cause of action set forth in plaintiff's complaint, defendant admits that Charles Chapman was and now is employed by defendant as a second cook in defendant's cookhouse or restaurant; that said Charles Chapman was paid by defendant upon a monthly basis at the regular rate of $125.00 per month, plus room and board, and that said Charles Chapman has assigned his claim, as set forth in said fifth cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the fifth cause of action.

Wherefore, having fully answered the complaint of plaintiff, defendant prays that the complaint be dismissed and that it recover of and from plaintiff its costs and disbursements herein incurred.

CAREY, HART, SPENCER
& McCULLOUGH
PHILIP CHIPMAN and
ROBERT W. MAXWELL
Attorneys for Defendant.

State of Oregon
County of Multnomah—ss.

Due service of the within Answer is hereby accepted in Multnomah County, this 5th day of December, 1940, by receiving a copy thereof, duly certified to as such by Philip Chipman, of Attorneys for Defendant.

GREEN, BOESEN & LANDYE
Attorney for Plaintiff.

[Endorsed]: Filed December 5, 1940. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [25]

And afterwards, to wit, on Wednesday, the 9th day of April, 1941, the same being the 33rd Judicial day of the Regular March, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [26]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Honorable James Alger Fee, District Judge, on April 7, 1941. Plaintiff was represented by Mr. James Landye, one of his attorneys, and defendant was represented by Mr. Robert W. Maxwell, of Seattle, Washington, and Mr. Philip Chipman, of its attorneys.

Based upon the proceedings had at said pre-trial hearing, it is

Ordered that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint:

I.

This is an action brought under and by virtue of an Act of Congress by the United States for the regulation of commerce among the states, to wit, the Fair Labor Standards Act of 1938 (29 U. S. C. A., paragraphs 201-219 inclusive).

II.

The complaint contains five causes of action for wages alleged to be due plaintiff and four assignors of plaintiff from [27] defendant. The claims of the four assignors of plaintiff have been duly and properly assigned by said assignors to plaintiff.

III.

The parties have entered into the following stipulation of facts which have been agreed to be the facts on which this action is based:

> "The parties hereto, represented by their respective attorneys, hereby enter into the following stipulation of facts:
>
> I.
>
> Defendant, Consolidated Timber Company, is a corporation organized and existing under the laws of the State of Michigan, qualified to do business in the State of Oregon. It owns timber-

lands and is engaged in the business of logging in Washington and Tillamook Counties, Oregon, with headquarters at Glenwood, Washington County. Defendant employs a logging crew, which is engaged in falling and bucking timber and loading it, on cars, and operates a logging railroad which connects with a common carrier railroad. Defendant also has certain contracts with independent contractors who log parts of its timber and deliver logs to defendant at specified points, where defendant transports them by railroad to the common carrier railroad. A small percentage of the logs cut and produced by defendant is sold locally to mills located in Washington County, Oregon, and is there manufactured into timber. By far the larger proportion of the logs produced by defendant is, however, transported by common carrier railroads to a point on the Willamette Slough in Multnomah County, Oregon, where the logs are dumped into the water and rafted. Defendant sells the rafts of logs to various sawmills, about 80 per cent of them going to sawmills in Oregon and about 20 per cent to sawmills in Washington. All sales are made and completed entirely within the State of Oregon and the purchasers send tugboats to pick up the rafts of logs which they have purchased and transport them to their mills wherever located. The logs are then manufactured into lumber by the purchaser mills and in each instance at

least 70 per cent of the lumber manufactured from said logs moves in interstate commerce.

II.

Between October 24, 1938, and June 28, 1940, defendant operated what is known in logging parlance as a cookhouse at Glenwood, Oregon. The cookhouse consisted of a kitchen and dining room in a building separate and apart from the other buildings of defendant. Defendant's employees were permitted, but not required, to use the facilities of the cookhouse. Meals were then sold to them at fixed rates of 45 cents per meal for employees and 50 cents per meal for strangers. Those employees who used the facilities of the cookhouse had deducted from their [28] wages the cost of the meals taken by them. Strangers paid for their meals in cash. Said cookhouse in Glenwood, Oregon, was used not only by employees of defendant, but also by employees of logging companies under contract with defendant, employees of some independent businesses operated at Glenwood, and others. Many of defendant's employees lived in Glenwood and ate at home. The greater proportion of defendant's employees did not use the facilities of the cookhouse. For example, during a typical month in which defendant employed 302 persons, 217 men regularly used defendant's cookhouse. Of these, 110 were employees of defendant (including 18 cookhouse em-

ployees), 101 were employees of logging companies under contract with defendant, and 6 were employees of independent businesses operated at Glenwood; 192 employees of defendant did not use the cookhouse facilities. During the same typical month, 302 meals were served to strangers.

III.

Subsequent to June 10, 1940, defendant opened and has since operated a cookhouse at a point known as Camp 2 located approximately 17 miles southwest of Glenwood. This cookhouse consists of a kitchen and dining room in a building separate and apart from other buildings of defendant. The facilities of this cookhouse are used by substantially all of defendant's employees at Camp 2, as it is the only practicable facility for eating at Camp 2. No employee, however, is required to eat there, and some employees occasionally go back to Glenwood, 17 miles away, for their meals, though this is rarely done. The said cookhouse is also used by employees of contractors of defendant and by the few members of the public who come to Camp 2. Meals are paid for at the same rates and in the same manner as was done at Glenwood.

IV.

At all times herein mentioned, defendant's operations were subject to a collective bargain-

ing agreement between Columbia Basin Loggers, an employers' organization of which defendant was a member, and Columbia River District Council No. 5, Lumber and Sawmill Workers' Union, affiliated with International Woodworkers of America (C. I. O.), of which substantially all of defendant's employees were members. By the provisions of said working agreements, one dated May 22, 1937, and the other dated September 10, 1940, it was provided, among other things:

'Article XV

Cook House Operation on Basis of Cost:

Employer-operated cook houses shall be conducted upon the basis of cost, it being the purpose hereof that such cook houses shall be self-sustaining but shall not earn a profit. Price of meals charged employees in such cook houses shall be based upon the principle here announced, and such price in each operation shall be settled by negotiation between the Employer and the Plant Committee."

[29]

V.

Plaintiff, and the assignors of plaintiff, in the second to fifth causes of action, are and have been employed in both of defendant's cookhouses, plaintiff as a baker and plaintiff's assignors as dishwashers, kitchen helpers and second cook. Their duties consisted of pre-

paring food and operating the kitchen. The food is served to and sold to defendant's employees and others who use the cookhouse at the rates hereinbefore set out. Plaintiff and plaintiff's assignors had been paid by defendant a fixed monthly wage for a 26-day month. Substantially all other employees of defendant are paid by the hour. Plaintiff and plaintiff's assignors perform no services for defendant other than in said cookhouse.

VI.

Defendant employs from 275 to 315 employees. All of defendant's employees (other than salaried employees) engaged in its logging operations are employed on a 40-hour week, and have been at all times since October 24, 1938, and all of said employees are paid time and one-half for all time in excess of 40 hours per week. Defendant, however, employs a limited number of employees on a monthly basis at an agreed monthly wage, including plaintiff and the assignors of plaintiff. The cookhouses in which plaintiff and plaintiff's assignors are employed are customarily operated seven days per week, although the logging operations are carried on only five days per week, for the reason that some of those using the cookhouse desire to have its accommodations available even when the logging operations are not running (the

cookhouse being operated by a skeleton crew when operations are down).

VII.

The enforcement policy adopted by the Administrator of the Fair Labor Standards Act is that cookhouse employees are exempt under the provisions of the Act, as shown by the letter from Philip B. Fleming, dated August 8, 1940, to National Lumber Manufacturers Association, of which the following is a copy:

"U. S. Department of Labor
Wage and Hour Division
Washington

August 8, 1940

Office of the
Administrator
National Lumber Manufacturers Association
1337 Connecticut Avenue
Washington, D. C.

Gentlemen:

This will confirm the verbal opinion given you on the telephone by Mr. Reel on August 6, 1940, that cook house employees in lumber camps are entitled to the exemption provided for service establishments [30] under Section 13 (a) (2) of the Fair Labor Standards Act, a copy of which is enclosed.

Of course, cook house employees who are also engaged in nonexempt work under the

act would be entitled to the benefits of the act for any week during which they perform such nonexempt work.

Sincerely yours,

(Signed) PHILIP B. FLEMING

Enclosure Administrator.'

and as shown by the following correspondence:

1. Letter from Columbia River District Council No. 5 to Regional Director of the Wage and Hour Division, dated August 8, 1940:

'August 8, 1940

Mr. W. O. Ash, Director
Wages and Hours Division
United States Department of Labor
Humboldt Bank Building
San Francisco, California

Dear Mr. Ash:

We are indirectly advised that the Administrator of the Wages and Hours Law has recently issued a decision declaring those employed in the cookhouses of logging camps to be exempt from regulations of the Wages and Hours Law. We are not acquainted with the text of such decision.

It was our understanding from personal conference with representatives of the Wages and Hours division as well as various bulletins and communications we have received

therefrom, but we would be notified of any hearing on a matter concerning the woodworking industry and invited to offer our opinions thereon. The decision on logging camp cookhouse crews, if it is as far reaching as we are informed, is of very serious concern to ourselves as a large body of organized workers in the woodworking industry. We dislike and object to being denied the opportunity to be heard on these matters.

The employers have readily grasped this decision on the cookhouse crews and within the past few weeks have ordered an extension of hours of work for the workers directly concerned. This will very likely result in strike. Our organization is prepared to fight with every economic and legal resource at our command to protect the thousands of workers concerned by this decision.

As stated above, we have not had the courtesy of [31] any information whatsoever on this important decision. We have immediately before us cases growing out of same that are very apt to result in strike action to protect our people against its imposition by the employers. We are now preparing for the necessary legal approach to the problem generally. Our attorneys and ourselves are handicapped by the surprising lack of information surrounding this decision. May we there-

fore request that twelve copies of same be forwarded to this office at our expense?

Assuring you of our sincere desire to cooperate with you and any agencies of the Wage and Hour Division and hoping that your cooperation may be had, we remain

Very truly yours,
INTERNATIONAL WOOD-
WORKERS OF AMERICA
COLUMBIA RIVER DISTRICT
COUNCIL #5
By DON HELMICK,
District Representative'

2. Letter from the Regional Director of the Wage and Hour Division to Columbia River District Council No. 5, dated August 16, 1940:

'U. S. Department of Labor
Wage and Hour Division

August 16, 1940
San Francisco, California

Mr. Don Helmick
District Representative
Columbia River District Council No. 5
710 S. E. Grand Avenue
Portland, Oregon

Dear Mr. Helmick:

Your letter of August 8 was received during my absence from town and I hasten to write concerning the "cookhouse worker in-

terpretation" recently sent out by the Administrator to govern inspectors in their checking of lumber firms.

My instructions from the Administrator in form of a telegram dated June 20, 1940, simply advised that I forward instructions to our inspectors to treat cookhouse employees as not covered by the Act. As you will recall our inspection force throughout the country for the past sixty days have been working in the lumber industry and it was necessary that our inspectors to know whether or not such employees were covered by the Act. I advised Mr. Pritchett while in Seattle about the nature of the interpretation and made it clear to him that Congress did not give the Administrator authority as was given to the NRA Administrator—to make decision of a binding [32] nature. In other words, whatever interpretations the Administrator gives are in the nature of an advisory opinion subject at all times to court interpretation. As I told Mr. Pritchett, I feel sure the Administrator would not at all be adverse to a court test of the question of cookhouse employees and my understanding through C. H. Elrey, our Portland representative, was that you intended to take such action.

To my knowledge there has been no formal written opinion or bulletin on the subject of bull cooks any more than there has been formal bulletin on hundreds of other interpreta-

tions that have been given by the Administrator to govern our policy in the course of our investigations.

I feel sure, however, that the Administrator is merely following the line of reasoning contained in Paragraph 19 of Interpretative Bulletin No. 6 wherein it is stated that cafeteria and supply stores operated as separate establishments by manufacturing concerns are to be considered service establishments.

If there is any further information I can give you, please feel free to write. In the meantime, I am asking Mr. Elrey to hold himself available if you wish to discuss the matter with him as our Portland representative.

With kindest regards,

WESLEY O. ASH

Regional Director'

3. Letter from Robert W. Maxwell, representing logging employers, to the Administrator of the Wage and Hour Division, dated August 1, 1940:

'August 1, 1940

Colonel Philip B. Fleming
Administrator, Wage Hour Division
United States Department of Labor
Washington, D. C.

Dear Colonel Fleming:

Recently Mr. Wesley O. Ash, Regional Director in San Francisco, was in Seattle and

I had the pleasure of meeting with him and Mr. Dille of your Seattle office.

At that time Mr. Ash stated to me that the Wage Hour Division had issued instructions through their Regional Offices to field investigators that lumber [33] camp cookhouse employees are not considered as covered by the Wage Hour Law. It is my understanding from this discussion that this ruling represents the enforcement policy of the Division.

You will probably recall that I, as attorney for the lumbering and logging industry in the Pacific Northwest, submitted a brief on the question of coverage of cookhouse employees. In April I discussed this problem with you and Mr. Denbo of your legal staff and after my return received a letter stating that the problem was being given further consideration and that I would be advised of the ultimate decision.

In order that I may have my file complete, I would very much appreciate receiving from your office a confirmation of the ruling that cookhouse employees are not considered as covered by the Wage Hour Law.

I very much appreciate the privilege accorded me to discuss with you and members of your staff some of the questions which have arisen in the practical application of the law to the lumbering and logging industry, particularly of the Pacific Northwest.

May I again, as an attorney representing employers in this area, repeat my offer of continued cooperation and a willingness to discuss with the Administration these practical problems as they arise.

Yours very truly,

RWM:s R. W. MAXWELL'

4. Letter from the Assistant Solicitor of the Department of Labor to Mr. Robert W. Maxwell, dated August 10, 1940:

'Department of Labor
Office of the Solicitor
Washington

August 10, 1940
In Reply Refer to:
LE:FR:MAG

Robert W. Maxwell, Esquire
354 Stuart Building
Seattle, Washington

Dear Mr. Maxwell:

Colonel Fleming has asked me to answer your letter of August 1, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to lumber camp cook house employees.

It is the view of the Wage and Hour Division that such employees come within the exemption provided in Section 13 (a) (2) of

the act for employees [34] of service establishments.

Of course, any such employees who during any workweek engage in activities which are not exempt from the act are entitled to the benefits of the act for the entire workweek.

Very truly yours,

RUFUS G. POOLE

Assistant Solicitor

In Charge of Opinions and Review.' ''

Enclosure

IV.

The hours worked by plaintiff and the assignors of plaintiff are as shown in Exhibits 7, 8, 9, 10, and 11.

V.

The regular monthly compensation of plaintiff, Ivan Womack, was $125.00; the regular monthly compensation of Robert Vandehey was $85.00; the regular monthly compensation of Marion B. Vandehey was $85.00; the regular monthly compensation of Floyd Calloway was $85.00; and the regular monthly compensation of Charles Chapman was $125.00, except that in each instance an additional sum of 40¢ per day was paid, effective December 1, 1940. In addition to their regular monthly salaries, plaintiff and the assignors of plaintiff were allowed board and room in the reasonable values shown on Exhibits 1, 2, 3, 4, and 5, which are agreed to be correct.

VI.

It is agreed that if plaintiff is entitled to recover an attorneys' fee hereunder, the sum of $500.00 is a reasonable fee for the services of plaintiff's attorneys.

VII.

Amendment by consent of parties 4/9/41

It is agreed that, if plaintiff is entitled to recover for overtime claimed due, plaintiff is also entitled to recover double said amount as liquidated damages, in accordance with section 16 (b) of the Wage and Hour Act.

It is further ordered that the contested issues to be submitted to the court for determination in connection with the [35] issues framed by this pretrial order are as follows:

I.

Plaintiff contends that plaintiff and the assignors of plaintiff are covered by the provisions of the Fair Labor Standards Act of 1938, and particularly by Section 7-(a) thereof.

Defendant contends that plaintiff and the assignors of plaintiff are not covered by the Fair Labor Standards Act of 1938 and are specifically exempt from the provisions of Section 7-(a) of the Fair Labor Standards Act of 1938 by Section 13 of the Fair Labor Standards Act of 1938.

This issue involves a mixed question of law and

fact to be determined upon the trial. The parties will supplement the stipulation of facts by some explanatory testimony.

II.

If it be held that plaintiff and the assignors of plaintiff are covered by the provisions of the Fair Labor Standards Act of 1938, the following issues are submitted with respect to the computation of overtime due, if any, to plaintiff and to the assignors of plaintiff.

1. In addition to their monthly compensation plaintiff and the assignors of plaintiff were allowed board and room in the reasonable values shown in Exhibits 1, 2, 3, 4, and 5. Plaintiff contends that for the purposes of computation of overtime the monthly compensation of plaintiff and the assignors of plaintiff should be their regular monthly salary plus the reasonable value of board and room. The defendant contends that for the purposes of computation of overtime only the regular monthly salary of plaintiff and the assignors of plaintiff should be used.

By way of illustration, plaintiff contends that the [36] regular monthly salarly of plaintiff, Ivan Womack, for the month of October, 1938, was $125.00, plus $35.10, or a total of $160.10. Defendant contends that the monthly salary of plaintiff, Ivan Womack, for October, 1938, was $125.00.

2. Plaintiff contends that in the first instance the overtime due plaintiff and the assignors of plain-

tiff from defendant should be computed by the following method of computation:

The monthly compensation of plaintiff and the assignors of plaintiff should be multiplied by twelve and then divided by fifty-two to obtain the weekly compensation. The weekly compensation thus resulting should be divided by forty-four for the year ending October 28, 1939, by forty-two for the year ending October 28, 1940, and by forty for all work subsequent to October 28, 1940, in order to determine the hourly compensation. Plaintiff and the assignors of plaintiff would have due them under this method of computation one and one-half times the hourly compensation for each hour worked in excess of forty-four hours per week during the year ending October 28, 1939, forty-two hours per week during the year ending October 28, 1940, and forty hours per week subsequent to October 28, 1940.

To illustrate this method of computation there is appended the following examples taken from Exhibit A attached to the complaint for the week ending November 4, 1938, worked by plaintiff, Ivan Womack. Ivan Womack's regular rate of wages was $125.00 per month. For said month of November, 1938, the reasonable value of the board and room given to said plaintiff, Ivan Womack, was $33.75. Therefore, according to plaintiff's contention, as shown in paragraph 1 hereof, his monthly compensation was $158.75. The method of computation is as follows: [37]

Example A. On assumed monthly salary of $158.75.

$12 \times \$158.75 = \$1905.00$,

$\$1905.00 \div 52 = \$36.63$ (weekly compensation),

$\$36.63 \div 44 = 83\frac{1}{4}$ cents (hourly compensation),

Overtime—21 hours $\times$ $83\frac{1}{4}$ cents $\times$ $1\frac{1}{2} = \$26.22$.

Example B. On assumed monthly salary of $125.00.

$12 \times \$125.00 = \$1500.00$,

$\$1500.00 \div 52 = \$28.85$ (weekly compensation),

$\$28.85 \div 44 = 65\frac{1}{2}$ cents (hourly compensation),

Overtime—21 hours $\times$ $65\frac{1}{2}$ cents $\times$ $1\frac{1}{2} =$ $20.63.

3. As an alternative method of computation, plaintiff submits that under the contract between the labor organization representing plaintiff and the employer's organization representing defendant, the monthly compensation given plaintiff by defendant was based on an assumed 48-hour week. The hourly compensation of plaintiff and the assignors of plaintiff is then determined by dividing the weekly compensation by 48 and paying additional half time for hours worked per week between 44 hours and 48 hours up to October 28, 1939, between 42 hours and 48 hours up to October 28, 1940, and between 40 hours and 48 hours since October 28, 1940, and paying one and one-half times said hourly

rate for all hours worked per week in excess of 48 hours.

Applying this method of computation to the same examples as used in subparagraph 2 hereof, the following results are reached:

Example A. On assumed monthly salary of $158.75.

12 × $158.75 = $1905.00,

$1905.00 ÷ 52 = $36.63 (weekly compensation),

$36.63 ÷ 48 = 76¼ cents (hourly compensation),

4 hours at ½ × 76¼ cents = $1.53

11 hours at 1½ × 76¼ cents = $12.58

$14.11 [38]

Example B. On assumed monthly salary of $125.00.

12 × $125.00 = $1500.00,

$1500.00 ÷ 52 = $28.65 (weekly compensation),

$28.65 ÷ 48 = 60 cents (hourly compensation),

4 hours at ½ × 60 cents = $1.20,

11 hours at 1½ × 60 cents = $9.90,

$11.10

4. Defendant contends that the monthly compensation paid plaintiff and the assignors of plaintiff by defendant was intended to and did cover all hours worked in excess of 40 hours per week at one and one-half times the regular rate of pay and that there is no overtime compensation due plaintiff or the assignors of plaintiff from defendant.

5. Alternatively, defendant contends that if the method of computation shown in subparagraph 4 hereof be not accepted, then the overtime due plaintiff and the assignors of plaintiff, if any, should be computed by the following method;

The monthly compensation should be multiplied by 12 and then divided by 52 to obtain the weekly compensation. The weekly compensation thus resulting should be divided each week by the number of hours worked during that week to determine the hourly compensation. Plaintiff and the assignors of plaintiff would have due them under this method of computation one-half times the hourly compensation for each hour worked per week in excess of forty-four during the year ending October 28, 1939, forty-two hours during the year ending October 28, 1940, and forty hours subsequent to October 28, 1940.

This is the method of computation set forth in Interpretative Bulletin No. 4 (July, 1940, issue) issued by the Wage and [39] Hour Division of the United States Department of Labor, paragraph 12, which reads as follows:

> "If an employee earns $23 per week but works a fluctuating number of hours, his regular rate of pay will be the average hourly rate each week. Suppose that during the course of four weeks the employee works 42, 46, 49, and 43 hours. His regular hourly rate of pay each week is approximately 55 cents, 50 cents, 47 cents, and 54 cents, respectively. For the first week the employee is entitled to be paid $23;

for the second week $24 ($23 + (4 hours × 25 cents)) or ((42 hours × 50 cents) + (4 hours × 75 cents)); for the third week approximately $24.67 ($23 + (7 hours × 23½ cents)) or ((42 hours × 47 cents) + (7 hours × 70½ cents)); For the fourth week approximately $23.27 ($23 + (1 hour × 27 cents)) or ((42 hours × 53.5 cents) + (1 hour × 81 cents))."

Applying this method of computation to the same examples as used in subparagraphs 2 and 3 hereof, the following results are reached:

Example A. On assumed monthly salary of $158.75.

12 × $158.75 = $1905.00,

$1905.00 ÷ 52 = $36.63 (weekly compensation),

$36.63 ÷ 65 = 56½ cents (hourly compensation),

21 hours at ½ × 56½ cents = $5.93.

Example B. On assumed monthly salary of $125.00.

12 × $125.00 = $1500.00,

$1500 ÷ 52 = $28.85 (weekly compensation),

$28.85 ÷ 65 = 44½ cents (hourly compensation),

21 hours at ½ × 44½ cents = $4.67.

These issues as to computation involve mixed questions of law and fact to be determined upon the trial. The parties will supplement the stipulated facts by some explanatory testimony.

EXHIBITS

At the pre-trial the following exhibits were introduced without objection by either party and may be introduced at the [40] trial. Each of the parties has reserved the right to offer further exhibits at the trial subject to the discretion of the court:

Defendant's Exhibit 1. Statement showing monthly compensation and board and room paid to plaintiff.

Defendant's Exhibit 2. Statement showing monthly compensation and board and room paid to plaintiff's assignor Robert Vandehey.

Defendant's Exhibit 3. Statement showing monthly compensation and board and room paid to plaintiff's assignor Marion B. Vandehey.

Defendant's Exhibit 4. Statement showing monthly compensation and board and room paid to plaintiff's assignor Floyd Calloway.

Defendant's Exhibit 5. Statement showing monthly compensation and board and room paid to plaintiff's assignor Charles Chapman.

Plaintiff's Exhibit 6. Working agreement, dated September 10, 1940, between Columbia Basin Loggers and Columbia River District Council No. 5, Lumber and Sawmill Workers' Union, affiliated with the International Woodworkers of America, C. I. O. (In connection with this exhibit it is agreed, for the purposes of this case, that said agreement is identical with a prior agreement between the same parties, dated May 22, 1937, and that this agreement may be treated, for the purposes of this case,

as having been in effect at all times subsequent to October 28, 1938.)

Defendant's Exhibit 7. Detailed statement showing the hours worked by plaintiff and the overtime due plaintiff under the method of computation shown in subparagraph 5-B above. [41]

Defendant's Exhibit 8. Detailed statement showing the hours worked by plaintiff's assignor Robert Vandehey under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 9. Detailed statement showing the hours worked by plaintiff's assignor Marion B. Vandehey under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 10. Detailed statement showing the hours worked by plaintiff's assignor Floyd Calloway under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 11. Detailed statement showing the hours worked by plaintiff's assignor Charles Chapman under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 12. Interpretative Bulletin No. 3, U. S. Department of Labor, Wage and Hour Division.

Defendant's Exhibit 13. Interpretative Bulletin No. 4, U. S. Department of Labor, Wage and Hour Division.

Plaintiff's Exhibit 14. Interpretative Bulletin No. 5, U. S. Department of Labor, Wage and Hour Division.

Defendant's Exhibit 15. "Working Agreement,

Columbia Basin Loggers and Columbia River District Council of Lumber and Sawmill Workers", entered into June 22, 1936.

Defendant's Exhibit 16. "Arbitration Award and Working Agreement between Columbia Basin Loggers and Columbia River District Council of Lumber and Sawmill Workers," dated May 22, 1937.

No other documents or factual exhibits will be used at the trial or offered as exhibits except those listed above. It is agreed by counsel for both parties and by the court that the Interpretative Bulletins and other rulings of the Administrator under the Fair Labor Standards Act shall not be used as evidence [42] and are not binding upon the court, but shall be considered by the court in the determination of the issues raised herein, the court to give to such rulings the consideration required of them by law.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is Ordered that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this 9th day of April, 1941.

JAMES ALGER FEE
United States District Judge

[Endorsed]: Filed April 9, 1941. G. H. Marsh, Clerk. [43]

On the 9th day of April, 1941, there was duly Filed in said Court, Defendant's Exhibit No. 7, in words and figures as follows, to wit: [44]

DEFENDANT'S PRE-TRIAL EXHIBIT 7
Received on Trial

WAGE COMPUTATION SHEET

Sheet .....

File .....

Date .....

Name of employee—Ivan Womack
Address—Glenwood, Oregon Occupation—Baker
Basis of payment—$125.00 per month—Room & Board furnished
Establishment—Consolidated Timber Company Address—Glenwood, Oregon

(a)	(b) Hours Worked							(c)	(d)	(e)	(f)	(g)	(h)	(i)
Work Week Ending	S	M	T	W	T	F	S	Total	Hourly Rate of Pay	Total Wages Due	Total Wages Paid	Under-payment	Illegal Deductions	Total Due Worker
44 hours														
11/ 5/38	10	12	10	12	11	10	—	65	.44	33.47	28.85	4.62	.05	4.57
11/12/38	—	—	12½	11	12	10½	10	56	.52	31.97	28.85	3.12	.03	3.09
11/19/38	10	12	12	11	10	10	—	65	.44	33.47	28.85	4.62	.05	4.57
11/26/38	10	11	10	10	10	9	—	60	.48	32.69	28.85	3.84	.04	3.80
12/ 3/38	10	12	10	11	10	11	—	64	.45	33.35	28.85	4.50	.05	4.45
12/10/38	10	10	10	10	11	10	—	61	.47	32.84	28.85	3.99	.04	3.95
12/17/38	10	10	10	9	10	9	—	58	.50	32.35	28.85	3.50	.04	3.46
12/24/38	10	10	9	11	10	9	—	59	.49	32.52	28.85	3.67	.04	3.63

(a)	(b) Hours Worked							(c)	(d)	(e)	(f)	(g)	(h)	(i)
Work Week Ending	S	M	T	W	T	F	S	Total	Hourly Rate of Pay	Total Wages Due	Total Wages Paid	Under-payment	Illegal Deductions	Total Due Worker
44 hours														
12/31/38	—	12	12	12	10	12	—	58	.50	32.35	28.85	3.50	.04	3.46
1/ 7/39	10	10	11	10	11	9	—	61	.47	32.84	28.85	3.99	.04	3.95
1/14/39	11	10	10	10	11	10	—	62	.47	33.08	28.85	4.23	.04	4.19
1/21/39	11	11	10	10	10	9	—	61	.47	32.84	28.85	3.99	.04	3.95
1/28/39	12	11	11	11	10	10	—	65	.44	33.47	28.85	4.62	.05	4.57
3/ 4/39	—	—	12½	15½	12½	12	14½	67	.43	33.79	28.85	4.94	.05	4.89
3/11/39	14	12	12	12	12	11	—	73	.40	34.65	28.85	5.80	.06	5.74
3/18/39	12	12	10	—	—	—	—	34						
3/25/39	—	12	11	11	10	10	—	54	.53	31.50	28.85	2.65	.03	2.62
4/ 1/39	9	10	10	10	9	10	—	58	.50	32.35	28.85	3.50	.04	3.46
4/ 8/39	10	9	9	9	10	9	—	56	.52	31.97	28.85	3.12	.03	3.09
4/15/39	9	10	9	9	10	9	—	56	.52	31.97	28.85	3.12	.03	3.09
4/22/39	9	10	9	9	10	9	—	56	.52	31.97	28.85	3.12	.03	3.09
4/29/39	9	10	9	9	9	9	—	55	.52	31.71	28.85	2.86	.03	2.83
5/ 6/39	9	9	9	9	9	8	—	53	.54	31.28	28.85	2.43	.02	2.41
5/13/39	9	9	9	9	9	9	—	54	.53	31.50	28.85	2.65	.03	2.62
5/20/39	9	8	8	8	9	9	—	51	.57	30.84	28.85	1.99	.02	1.97
								1462		780.77	692.40	88.37	.92	87.45

WAGE COMPUTATION SHEET

Sheet .....

File .....

Date .....

Name of employee—Ivan Womack
Address—Glenwood, Oregon Occupation—Baker
Basis of payment—$125.00 per month—Room & Board furnished
Establishment—Consolidated Timber Company Address—Glenwood, Oregon

(a)	(b) Hours Worked							(c)	(d)	(e)	(f)	(g)	(h)	(i)
Work Week Ending	S	M	T	W	T	F	S	Total	Hourly Rate of Pay	Total Wages Due	Total Wages Paid	Under-payment	S. S. Deductions	Total Due Worker
44 hours														
6/17/39	—	—	—	8¾	8	7½		24¼			28.85			
6/24/39	8	8½	8	8	8	3½		44			28.85			
7/ 1/39	8	8	8½					24½			28.85			
7/15/39	9	9½	10	9	6½	—	—	44			28.85			
7/22/39	9	10	9	9	7	—	—	44			28.85			
7/29/39	9	9½	9	9	9	—	—	45½	.63	29.32	28.85	.47	.01	.46
8/ 5/39	9	9	10	11	12	12	12	75	.38		46.83			
8/12/39	12	12	14	12	12	12	12	86	.34		53.69			
8/19/39	11	12	—	11	8	7	—	49	.59		30.59			
8/26/39	8	8	—	9	8	9	7	49	.59		30.59			
9/ 2/39	8	4	—	—	—	—	—	12			28.85			
9/ 9/39	—	9	8½	9	9	8½	—	44			28.85			
9/16/39	9	9	9	8	8	2	—	45	.64	29.17	28.85	.32	.01	.31

vs. Ivan Womack

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(a)	(b)							(c)	(d)	(e)	(f)	(g)	(h)	(i)
Work Week Ending	Hours Worked								Hourly Rate of Pay	Total Wages Due	Total Wages Paid	Under-payment	Illegal Deductions	Total Due Worker
	S	M	T	W	T	F	S	Total						
44 hours														
10/14/39	—	—	—	—	11	10	—	21			28.85			
10/21/39	9	9	9	10	7	—	—	44			28.85			
42 hours														
10/28/39	9	9	8	8	8	—	—	42			28.85			
11/ 4/39	9	9	8	8	8	—	—	42			28.85			
11/11/39	9	9	8	8	8	—	—	42			28.85			
11/18/39	9	9	8	8	8	—	—	42			28.85			
11/25/39	9	9	10	8	8	—	—	44	.66	29.51	28.85	.66	.01	.65
12/ 2/39	8½	8½	9	8	8	—	—	42			28.85			
12/ 9/39	9	9	8	8	8	—	—	42			28.85			
12/16/39	9	9	8	8	8	—	—	42			28.85			
12/23/39	9	9	8	8	8	—	—	42			28.85			
12/30/39	—	—	10	10	7	—	—	27			28.85			
1/ 6/40	—	9	9	8	8	8	—	42			28.85			
1/13/40	9	9	8	8	8	—	—	42			28.85			
1/20/40	9	9	8	8	8	—	—	42			28.85			
1/27/40	9	9	8	8	8	—	—	42			28.85			
2/ 3/40	9	9	8	8	8	—	—	42			28.85			
2/10/40	9	9	8	8	8	—	—	42			28.85			
2/17/40	9	9	8	8	8	—	—	42			28.85			

(a) Work Week Ending	(b) Hours Worked S	M	T	W	T	F	S	(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under-payment	(h) S. S. Deductions	(i) Total Due Worker
42 hours														
2/24/40	9	9	8	8	8	—	—	42			28.85			
3/ 2/40	9	9	8	8	8	—	—	42			28.85			
3/ 9/40	9	9	8	8	8	—	—	42			28.85			
3/16/40	9	9	8	8	8	—	—	42			28.85			
3/23/40	9	9	8	8	8	—	—	42			28.85			
3/30/40	9	9	8	8	8	—	—	42			28.85			
4/ 6/40	—	9	9	8	8	—	—	34			28.85			
4/13/40	9	9	8	8	8	—	—	42			28.85			
4/20/40	9	9	8	8	8	—	—	42			28.85			
4/27/40	9	9	8	8	8	—	—	42			28.85			
5/ 4/40	9	9	8	8	8	—	—	42			28.85			
5/11/40	9	9	8	8	8	—	—	42			28.85			
5/18/40	9	9	8	8	8	—	—	42			28.85			
5/25/40	9	9	8	8	8	—	—	42			28.85			
6/ 1/40	—	9	9	8	8	8	—	42			28.85			
6/ 8/40	9	9	8	8	8	—	—	42			28.85			
6/15/40	9	8	9	8	8	—	—	42			28.85			
6/22/40	9	9	8	8	8	—	—	42			28.85			
6/29/40	9	9	8	8	8	—	—	42			28.85			
7/20/40	—	—	—	8	4	8	6	26			28.85			
7/27/40	8	8	8	8	8	—	—	40			28.85			

WAGE COMPUTATION SHEET

Sheet .....

File .....

Date .....

Name of employee—Ivan Womack
Address—Glenwood, Oregon Occupation—Baker
Basis of Payment—$125.00 per month—Room & Board Furnished
Establishment—Consolidated Timber Company Address—Glenwood, Oregon

(a)	(b) Hours Worked							(c)	(d)	(e)	(f)	(g)	(h)	(i)
Work Week Ending	S	M	T	W	T	F	S	Total	Hourly Rate of Pay	Total Wages Due	Total Wages Paid	Under-payment	S. S. Deductions	Total Due Worker
42 hours														
8/ 3/40	8	8	8	8	10	—	—	42			28.85			
8/10/40	10	10	8	—	—	—	—	28			28.85			
8/17/40	10	10	10	10	8	—	—	48	.60	30.65	28.85	1.80	.02	1.78
8/24/40	10	10	10	10	9	—	—	49	.59	30.92	28.85	2.07	.02	2.05
8/31/40	10	10	10	10	8	—	—	48	.60	30.65	28.85	1.80	.02	1.78
9/ 7/40	—	10	11	10	10	—	—	41			28.85			
9/14/40	10	10	10	10	10	10	—	60	.48	33.17	28.85	4.32	.04	4.28
9/21/40	10	10	10	10	10	9	—	59	.49	33.02	28.85	4.17	.04	4.13
9/28/40	10	10	10	10	10	8	—	58	.50	32.85	28.85	4.00	.04	3.96

(a) Work Week Ending	(b) Hours Worked S	M	T	W	T	F	S	(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under-payment	(h) S. S. Deductions	(i) Total Due Worker
42 hours														
10/ 5/40	10	10	10	10	10	8	—	58	.50	32.85	28.85	4.00	.04	3.96
10/12/40	8	10	10	10	10	8	—	56	.52	32.49	28.85	3.64	.04	3.60
10/19/40	8	10	10	10	10	8	—	56	.52	32.49	28.85	3.64	.04	3.60
10/26/40	8	10	10	10	10	8	—	56	.52	32.49	28.85	3.64	.04	3.60
40 hours														
11/ 2/40	9	10	10	10	10	8	—	57	.51	33.18	28.85	4.33	.04	4.29
11/ 9/40	—	—	10	10	10	9	—	39			28.85			
11/16/40	10	10	10	10	10	8	—	58	.50	33.35	28.85	4.50	.05	4.45
11/23/40	8	10	10	10	10	8	—	56	.52	33.01	28.85	4.16	.04	4.12
11/30/40	8	10	10	10	10	8	—	56	.52	33.01	28.85	4.16	.04	4.12
12/ 7/40	8	10	10	10	9	8	—	55	.52	32.75	28.85	3.90	.04	3.86
12/14/40	9	9	9	9	10	8	—	54	.53	32.56	28.85	3.71	.04	3.67
12/21/41	10	10	9	9	8	8	—	54	.53	32.56	28.85	3.71	.04	3.67
2/ 8/41	—	8	10	10	10	10	—	48	.60	31.25	28.85	2.40	.02	2.38
2/15/41	—	10	10	10	10	10	—	50	.58	31.75	28.85	2.90	.03	2.87
2/22/41	—	10	11	10	10	8	—	49	.59	31.50	28.85	2.65	.03	2.62
2/29/41	—	11	10	11	11	10	—	53	.54	32.36	28.85	3.51	.04	3.47

[Endorsed]: Filed Apr. 9, 1941. G. H. Marsh, Clerk. [47]

And, to wit, on the 16th day of December, 1941, there was duly filed in said court, an Opinion in words and figures as follows, to wit: [48]

[Title of District Court and Cause.]

OPINION

This action was filed by plaintiff on his own behalf and as assignee of the claims of other employees of defendant in cookhouses operated by defendant near its logging camps, based upon the provisions of the Fair Labor Standards Act of 1938. Pre-trial conferences were held and a pre-trial order was signed by the court. Subsequently, the cause was tried by the court without a jury.

The pre-trial order was drafted jointly by the attorneys for the respective parties and is here set out in full as an excellent example of such an order. The agreed facts are concisely stated and the issues are clear cut for decision, and documents necessary for the determination were marked and listed therein. Such an outstanding consolidated pleading requires special commendation of the draughtsmen.

Shortly stated, the question is whether these employees are covered by the provisions of 7A of the Fair Labor Standards Act of 1938 or are specifically exempt therefrom by the provisions of Section 13. [49]

Even in an establishment where the employer is engaged in commerce or in the production of goods for commerce, a particular employee there who is

not so engaged does not fall under the act. Specific exemption is given to all employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in interstate commerce." The applicability of this exemption depends according to orthodox interpretation upon "whether the particular establishment possesses the characteristic of a retail or service establishment".

The particular employee, then, is not within the act if he is not engaged in commerce or the production of goods for commerce, and is specifically exempted if the establishment in which he works is mostly selling or servicing in intrastate commerce.

The cook, dishwasher or waiter employed by a company to feed a crew producing logs for interstate shipment is an integral part of the crew and is producing goods for commerce under the definition of the act, where the company furnishes the food and makes no deduction therefor from the wages of the timber workers. Philadelphia, Baltimore & Washington Railroad Company vs. Smith, 250 U. S. 101, although under a different statute, is persuasive by analogy upon this point.

However, that decision throws no light upon the clear-cut exemption granted by this Act. To the existence of the exemption, the court now turns.

The restaurant, the cafeteria and the roadside diner are each a typical example of a service establishment which is local in character and renders a service to [50] private individuals for direct con-

sumption at a retail price. (Interpretative Bulletin No. 6, Sections 23 and 24). Even though a cafeteria is operated in a factory by employees of a common employer with the factory workers who are producing goods for commerce, it may still be a service establishment. (Interpretative Bulletin No. 6, Section 39).

There are several factors pertinent to each of these establishments. A cookhouse is a restaurant or roadside diner and, therefore, a typical service establishment. A service was rendered in a physically separate establishment where meals were sold at retail to, and the facilities of the establishment were placed at the disposal of, private individuals for direct consumption and use. Persons not in the employment of defendant or companies under contract with defendant were served upon the same terms as persons so employed, except that the price was higher for the former. Employees of logging companies under contract with defendant were served. There was no requirement that defendant's employees patronize either cookhouse. Those employees who were served in the cookhouse were charged a price for the meals eaten, which in the aggregate sustained the establishment but was not above cost. These payments were deducted from the employees' wages.

Obviously, if either of these cookhouses were operated by an entirely independent concern, it would be designated as a restaurant and would fall in the class of a retail or service establishment.

Such a restaurant would do the majority of its selling or servicing in interstate [51] commerce, irrespective of the fact that meals were sold to the employees of one company only. This factor highlights a fundamental problem. The timber worker is a member of the public. As to meals, he is himself a consumer and purchases food at retail as any other member of the consuming public. This is true whether he is employed or unemployed. The fundamental characteristic of a restaurant is sale at retail to the ultimate consumer in intrastate commerce.

But in this case one circumstance should establish the cookhouses as service establishments. The employees in the woods and the union stipulated that these should be operated at cost and should be self-sustaining. Clearly, the employees actually producing goods for commerce recognize thereby that the cookhouses are maintained for their service and convenience. Under this clause, the burden of any increased wages to cookhouse employees would fall upon those who were engaged in producing goods for commerce. The latter are not required to patronize the cookhouse but it is there for their service if they so desire.

If the buckers and fallers were compelled to eat at a cookhouse and the meals were furnished as a part of the pay, a different situation would be presented. These skilled woodsmen who are paid by the hour and who are not boarded by the company must buy food and service thereof. Any in-

crease in the price of board at the cookhouse will be deducted from the money paid them.

To these factors applicable to both cookhouses, there are special circumstances which relate to the establishment at Glenwood. Although that facility is [52] unquestionably a convenience to the company in keeping the crews fed, it is probably no more so than if it were under entirely independent control. Certainly, it cannot be regarded as a necessary adjunct to defendant's business. This cookhouse caters to persons not in employment of defendant or companies under contract with it. These persons are comparatively few and are charged a higher price. But there is an independent facility, a lunch counter, also located at Glenwood, which is in competition. While this lunch counter could not under present conditions take care of all the trade were the cookhouse closed, its employees are exempt from the operation of the Act, and the possibility of expansion is a circumstance of weight.

Many employees here own their homes and are thus free from the necessity of boarding outside. Some employees live in other places and own cars. These likewise have a choice.

This cookhouse falls under Section 39 of Interpretative Bulletin No. 6:

> "Many concerns provide facilities for their employees. In some cases a company operates in its factory a cafeteria or store which is physically separated from the remainder of the plant and is conducted in the same manner as

> commonly recognized retail or service establishments which are not affiliated with the company. In these cases, the goods or services are sold for cash to the employees, and the store is normally open to the general consuming public. The employer caters to the needs and wants of the employees viewed as part of the general consuming public and not merely as employees. * * *''

There is a sharp differentiation between the conditions at Glenwood and those which prevail at Camp 2. The latter camp is quite isolated. It is seventeen miles from Glenwood. [53] Only a small number of the employees have homes there. Practically it is very difficult for the employees of defendant and companies under contract with defendant to take meals elsewhere. The great majority, in fact, do eat at the cookhouse. Unquestionably, it is more nearly vital for the company to have this eating place there in order to prosecute the production of goods for commerce. There is no independent facility at this camp, and as a practical matter, it would probably be difficult to find any one to embark upon such a business without some favorable arrangement with the company. Although there are exceptions, practically all the patronage of this cookhouse consists of employees of defendant and companies under contract with it.

It is possible to view this establishment as an adjunct of the business of the company, necessary

for the production of goods for commerce and the employees as vital to the logging operation.

The Administrator has adopted this view and has issued a ruling which by its terms apparently covers the situation. This interpretation, in part, reads:

> "In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of the facilities is an integral part of the principal operations. The employer does not satisfy the wants of the employees as part of the general consuming public. Deductions for these facilities are normally made from the cash wages received by the employee. The facilities are not made available to the general public. In these cases, there will not be a separate retail or service establishment within the exemption. Thus, for example, isolated lumber and mining camps operate cookhouses and bunkhouses for employees. These cookhouses and bunkhouses do not serve the general public but are an integral part of the lumber or mining operations." Section 40, Interpretative Bulletin No. 6. [54]

The interpretation is subject to criticism on several bases. First, a service establishment does not change its character even if it is in an isolated spot and of great practical convenience to the employer. Second, the employees of defendant and employees

of companies under contract with defendant are the "general public" here, purchasing goods and service at retail, even though the price is deducted from their wages. Third, the skilled workers producing goods for commerce are subjected to a greater burden than they would be if working in a settled community, since the cookhouse is to be self-sustaining for the benefit of workers. Fourth, if the employer were to allow an independently controlled establishment to operate a cookhouse here, the skilled worker would pay retail prices at a higher scale and could not longer exercise an influence on the conduct of the cookhouse. Fifth, the policy should be to encourage employers to operate service establishments, such as gasoline filling stations, swimming pools and beauty parlors at cost to the employees, in order to increase the satisfaction of employees at isolated camps and assist in producing goods for commerce.

Influenced by such considerations, the Administrator has previously taken an opposite position. During the pendency of this case and owing apparently to developments in this controversy, the former ruling was repudiated, notwithstanding the fact that certain courts had made the previous pronouncement the basis for decision. Labates vs. The Interstate Company, opinion January 29, 1941, Western District Tennessee, Western Division.

Each party has attacked the interpretation of the Administrator when it did not further his cause

and has [55] defended the ruling when it assisted his case. The court believes as a matter of policy the considerations above set out should control as to Camp 2, as well as at Glenwood. Clearly, on the other hand, the last ruling is a permissible one under the language of the statute. There is no question that the Administrator had all the facts before him when it was issued, although he held no hearing. In the nature of things the administrative agency is impressed with the remedial nature of the Act and the urge to carry out the general purpose of Congress. On the other hand, the court is of opinion that exemptions wisely placed in such legislation should be enforced for the protection of the public at large against bureaucratic regulation of matters entirely local in character, such as the purveying of food, to the end that conditions such as those denounced in Schecter vs. United States, 295 U. S. 495, shall not again prevail.

But the action of the court here is controlled by the declaration of the United States Supreme Court in United States vs. American Trucking Association, Inc., 310 U. S. 534, 549, where it is said:

> "In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new' ". [Norwegian Nitrogen Co. vs. United States, 288 U. S. 294, 315.]

This holding is not affected by the fact that in the consideration of the situation, the Administrator has radically changed position. [56]

The court, therefore, determines that the cookhouse at Glenwood is a retail or service establishment and employees thereof are exempt, while that at Camp 2 is an adjunct to the production of goods for commerce and employees therein are assisting in that process.

The remaining question is whether the scales of computation proferred by plaintiff or defendant be adopted. Neither of those offered by plaintiff is supported by any authority and each leads to results which the court considers unreasonable. On the other hand, the primary plan offered by defendant cannot be accepted because the court cannot find from the evidence that the contract between defendant and these employees contains the terms which are inherent in the basis for this plan. The second plan tendered by the defendant is apparently reasonable. Furthermore, it has the sanction of the Administrator and is adopted on the principles discussed above.

Findings and judgment in accordance herewith will be submitted.

[Endorsed]: Filed December 16, 1941. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [57]

And afterwards, to wit, on Thursday, the 8th day of January, 1942, the same being the 42nd Judicial day of the Regular November, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [58]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for hearing before the Honorable James Alger Fee, judge of the above entitled court, on the 7th day of April, 1941, on the pleadings and proofs, and briefs having been submitted and arguments made by counsel for the respective parties, the court, after due deliberation, does hereby make its findings of fact as follows:

FINDINGS OF FACT

I.

This is an action brought under and by virtue of an Act of Congress by the United States for the regulation of commerce among the states, to wit, the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sections 201-219, inclusive).

II.

The complaint contains five causes of action for wages alleged to be due plaintiff and four assignors of plaintiff from defendant. The claims of the four

assignors of plaintiff have been duly and properly assigned by the said assignors [59] to plaintiff.

III.

Defendant, Consolidated Timber Company, is a corporation organized and existing under the laws of the State of Washington, qualified to do business in the State of Oregon. It owns timberlands and is engaged in the business of logging in Washington and Tillamook Counties, Oregon, with headquarters at Glenwood, Washington County. Defendant employs a logging crew, which is engaged in falling and bucking timber and in loading it on cars, and operates a logging railroad, which connects with a common carrier railroad. Defendant also has certain contracts with independent contractors who log parts of its timber and deliver logs to defendant at specified points, where defendant transports them by railroad to the common carrier railroad. A small percentage of the logs cut and produced by defendant is sold locally to mills located in Washington County, Oregon, and is there manufactured into lumber. By far the larger proportion of the logs produced by defendant is, however, transported by common carrier railroads to a point on the Willamette Slough in Multnomah County, Oregon, where the logs are dumped into the water and rafted. Defendant sells the rafts of logs to various sawmills, about 80 per cent of them going to sawmills in Oregon and about 20 per cent to sawmills in Washington. All sales are made and completed

entirely within the State of Oregon and the purchasers send tugboats to pick up the rafts of logs which they have purchased and transport them to their mills wherever located. The logs are then manufactured into lumber by the purchaser mills and in each instance at least 70 per cent of the lumber manufactured from said logs moves in interstate commerce. [60]

IV.

Between October 24, 1938, and June 28, 1940, defendant operated at Glenwood, Oregon, what is known in logging parlance as a cookhouse. The cookhouse consisted of a kitchen and a dining room in a building separate and apart from the other buildings of defendant. Defendant's employees were permitted, but not required, to use the facilities of the cookhouse. Meals were then sold to them at fixed rates of 45 cents per meal for employees and 50 cents per meal for strangers. Those employees who used the facilities of the cookhouse had deducted from their wages the cost of the meals taken by them. Strangers paid for their meals in cash. Said cookhouse in Glenwood, Oregon, was used not only by employees of defendant, but also by employees of logging companies under contract with defendant, by employees of some independent business operated at Glenwood, and by others. Many of defendant's employees lived in Glenwood and ate at home. The greater proportion of defend-

ant's employees did not use the facilities of the cookhouse. For example, during a typical month in which defendant employed 302 persons, 217 men regularly used defendant's cookhouse. Of these, 110 were employees of defendant (including 18 cookhouse employees), 101 were employees of logging companies under contract with defendant, and 6 were employees of independent businesses operated at Glenwood; 192 employees of defendant did not use the cookhouse facilities. During the same typical month, 302 meals were served to strangers.

V.

Subsequent to June 10, 1940, defendant opened and has since operated a cookhouse at a point known as Camp 2 located approximately 17 miles southwest of Glenwood. This cookhouse [61] consists of a kitchen and dining room in a building separate and apart from other buildings of defendant. The facilities of this cookhouse are used by substantially all of defendant's employees at Camp 2, as it is the only practicable facility for eating at Camp 2. No employees, however, are required to eat there and some employees occasionally go back to Glenwood, 17 miles away, for their meals, though this is rarely done. The said cookhouse is also used by employees of contractors of defendant and by the few members of the public who come to Camp 2. Meals are paid for at the same rates and in the same manner as was done at Glenwood.

VI.

At all times herein mentioned, defendant's operations were subject to a collective bargaining agreement between Columbia Basin Loggers, an employers' organization of which defendant was a member, and Columbia River District Council No. 5, Lumber and Sawmill Workers' Union, affiliated with the International Woodworkers of America (C. I. O.), of which substantially all of defendant's employees were members. By the provisions of said working agreements, one dated May 22, 1937, and the other dated September 10, 1940, it was provided, among other things:

"ARTICLE XV

Cook House Operation on Basis of Cost

Employer-operated cook houses shall be conducted upon the basis of cost, it being the purpose hereof that such cookhouses shall be self-sustaining but shall not earn a profit. Price of meals charged employees in such cook houses shall be based upon the principle here announced, and such price in each operation shall be settled by negotiation between the Employer and the Plant Committee."

VII.

Plaintiff and the assignors of plaintiff, in the second [62] to fifth causes of action, are and have been employed in both of defendant's cookhouses; plaintiff as a baker and plaintiff's assignors as

dishwashers, kitchen helpers and second cook. Their duties consisted of preparing food and operating the kitchens. The food is served to and sold to defendant's employees and others who use the cookhouses at the rates hereinbefore set out. Plaintiff and plaintiff's assignors had been paid by defendant a fixed monthly wage for a 26-day month. Substantially all other employees of defendant are paid by the hour. Plaintiff and plaintiff's assignors perform no services for defendant other than in said cookhouses.

VIII.

Defendant employs from 275 to 315 employees. All of defendant's employees (other than salaried employees) engaged in its logging operations are employed on a 40-hour week, and have been at all times since October 24, 1938, and all of said employees are paid time and one-half for all time in excess of 40 hours per week. Defendant, however, employs a limited number of employees on a monthly basis at an agreed monthly wage, including plaintiff and the assignors of plaintiff. Although the logging operations are carried on only five days per week, the cookhouses in which plaintiff and plaintiff's assignors are employed are customarily operated seven days per week for the reason that some of those using the cookhouses desire to have the accommodations available even when the logging operations are not running (the cookhouses being operated by a skeleton crew when operations are down).

IX.

The regular monthly wages of the plaintiff, Ivan Womack, while working at Camp 2 and to the date of the filing of the complaint was the sum of $125, and during said period he [63] worked the hours and was paid the wages as shown on Exhibit A, attached to these findings of fact and made a part hereof, and there is due and owing said Ivan Womack as overtime the sum of $41.80, less 42 cents for social security, leaving a balance of $41.38 The regular monthly wages of plaintiff's assignor Robert Vandehey was the sum of $85 while working at Camp 2 and to the date of the filing of the complaint, and during said period he worked the hours and was paid the wages as shown on Exhibit B, attached to these findings of fact and made a part hereof, and there is due and owing plaintiff for overtime worked by said Robert Vandehey the sum of 66 cents, less 1 cent for social security, leaving a balance of 65 cents. The regular monthly wages of plaintiff's assignor Charles Chapman was the sum of $125 while working at Camp 2 and to the date of the filing of the complaint, and during said period he worked the hours and was paid the wages as shown on Exhibit C attached to these findings of fact and made a part hereof, and there is due and owing plaintiff for overtime worked by said Charles Chapman the sum of $46.41, less 45 cents for social security, leaving a balance of $45.96. The regular monthly wages of plaintiff's assignor

Lloyd Calloway was the sum of $85 per month while working at Camp 2 and to the date of the filing of the complaint, and during said period he worked the hours and was paid the wages as shown on Exhibit D attached to these findings of fact and made a part hereof, and there is due and owing plaintiff for overtime worked by said Lloyd Calloway the sum of $20.07, less 20 cents for social security, leaving a balance of $19.87. Plaintiff's assignor Marion Vandehey performed no work at Camp 2 during the period covered by the complaint and is not entitled to recover herein. [64]

X.

The sum of $500 is a reasonable attorney's fee for the services of plaintiff's attorneys.

Based upon the foregoing findings of fact, the court does make and enter herein the following

CONCLUSIONS OF LAW

I.

The work performed by plaintiff and the assignors of plaintiff at the cookhouses at Glenwood and Camp 2 is necessary to the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938 (53 Stat. 1060, 29 U. S. C. A., Sec. 207).

II.

The cookhouse at Glenwood is a retail or service establishment within the meaning of Section 13

(a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., Sec. 213), and the provisions of Sections 6 and 7 of the Fair Labor Standards Act therefore do not apply to plaintiff and the assignors of plaintiff for work performed by them at the cookhouse at Glenwood.

III.

The cookhouse at Camp 2 is not a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A., Sec. 213), and the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938 therefore apply to the work performed by plaintiff and the assignors of plaintiff at Camp 2. [65]

IV.

Under the provisions of Section 7 (a) of the Fair Labor Standards Act of 1938, plaintiff and the assignors of plaintiff are entitled to recover from defendant compensation for all hours worked by them at Camp 2 in excess of 42 hours per week prior to October 24, 1940, and in excess of 40 hours per week subsequent to October 24, 1940, at one and one-half times the regular hourly rate at which they were employed. The regular hourly rate of plaintiff and the assignors of plaintiff, all of whom were employed by the month, shall be determined in accordance with paragraph 12 of Interpretative Bulletin No. 4 (July 1940 issue) issued by the Wage and Hour Division of the United States Department

of Labor, to wit, by multiplying the monthly compensation of each of said employees by 12 and then dividing the result by 52, thus obtaining the weekly compensation, and then dividing the weekly compensation thus determined by the number of hours worked during each week, which will result in the hourly rate on which said overtime shall be based. The method of computation of overtime is as illustrated in Exhibits A, B, C and D attached to and made a part of these findings and conclusions.

V.

Under the provisions of Section 16 (b) of said Fair Labor Standards Act of 1938, plaintiff and the asssignors of plaintiff are entitled to recover from defendant, in addition to the overtime due them as above provided, an equal amount as liquidated damages.

Dated this 8th day of January, 1942.

JAMES ALGER FEE
United States District Judge

[Endorsed]: Filed January 8, 1942. G. H. Marsh, Clerk. By R. DeMott, Deputy Clerk. [66]

And afterwards, to wit, on Thursday, the 8th day of January, 1942, the same being the 57th Judicial day of the Regular November, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [67]

In the District Court of the United States
for the District of Oregon

Civil No. 522

IVAN WOMACK,

Plaintiff,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Defendant.

DECREE

This cause having come on to be heard before the Honorable James Alger Fee, Judge of the above entitled Court, evidence having been submitted and the matter having been argued orally and briefs having been submitted by the respective parties, and the Court after due consideration having made and filed its findings,

It is decreed that plaintiff recover of and from the defendant the sum of Two Hundred Fifteen and 72/100 ($215.72) Dollars, and the further sum of Five Hundred ($500.00) Dollars, attorneys' fee, and that plaintiff recover of and from the defendant for costs and disbursements the sum of Thirty-four 96/100 Dollars, to be taxed, with interest on said sums at 6% per annum from the date hereof until paid.

And it is so ordered.

Dated this 8th day of January, 1942.

JAMES ALGER FEE
Judge

[Endorsed]: Filed January 8, 1942. G. H. Marsh, Clerk. By R. DeMott, Deputy Clerk. [68]

And afterwards, to wit, on the 21st day of January, 1942, there was duly filed in said Court, a Notice by Defendant of Appeal, in words and figures as follows, to wit: [69]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Consolidated Timber Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered herein on January 8, 1942.

HART, SPENCER, McCULLOCH & ROCKWOOD
PHILIP CHIPMAN
R. W. MAXWELL
Attorneys for Consolidated Timber Company,
1410 Yeon Building,
Portland, Oregon.

[Endorsed]: Filed January 21, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [70]

And Afterwards, to wit, on the 21st day of January, 1942, there was duly Filed in said Court, a Supersedeas Bond On Appeal by Defendant, in words and figures as follows, to wit: [71]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, that the undersigned, Consolidated Timber Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereunder," as surety, are held and firmly bound unto Ivan Womack in the full and just sum of one thousand dollars ($1,000.00) to be paid to the said Ivan Womack, his heirs and assigns; to which payment well and truly to be made the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents.

Whereas, lately at a term of the District Court of the United States for the District of Oregon in a suit pending in said court between Ivan Womack, as plaintiff, and Consolidated Timber Company, a corporation, as defendant, a judgment was rendered against said defendant, Consolidated Timber Company, for the sum of $715.72 and costs; and the said Consolidated Timber Company, a corporation, having filed its notice of appeal herein to the United States Circuit Court of Appeals for the [72] Ninth Circuit to reverse said judgment,

Now, the condition of the above obligation is such that if the said Consolidated Timber Company, a corporation, shall prosecute its appeal to effect and shall pay the amount of said judgment and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the said principal and surety have executed this bond on this 19th day of January, 1942.

CONSOLIDATED TIMBER COMPANY, a corporation
HART, SPENCER, McCULLOCH & ROCKWOOD
PHILIP CHIPMAN
Its Attorneys

Principal

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
By TOM J. MAHONEY, JR. (Seal)
Its Attorney in Fact

Surety.

The above bond on appeal is hereby approved:

JAMES ALGER FEE
United States District Judge.

State of Oregon,
County of Mult.—ss.

Due service of the within Supersedeas Bond is hereby accepted at Portland, Oregon, this 20 day of Jan. 1942 by receiving a copy thereof, duly certified to as such by Philip Chipman of attorneys for defendant.

JAMES LANDYE,
Attorney for Plaintiff.

[Endorsed]: Filed January 21, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [73]

And Afterwards, to wit, on the 21st day of January, 1942, there was duly Filed in said Court, a Statement of Points on which appellant intends to rely in words and figures as follows, to wit: [74]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Comes now Consolidated Timber Company, defendant-appellant herein, and makes this its statement of points upon which it intends to rely on the appeal of this case to the United States Circuit Court of Appeals for the Ninth Circuit.

Point I.

Employees in logging camp cookhouses are not engaged in the production of goods for commerce

within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938 (53 Stat. 1060, 29 U. S. C. A., Sec. 207).

The District Court therefore erred in making its Conclusion of Law No. 1 that such work constituted production of goods for commerce within the meaning of said section.

Point II.

A logging camp cookhouse located at a remote point is a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A., Sec. 213), and the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938 therefore do not apply to work performed in such a logging camp cookhouse.

The District Court therefore erred in entering its [75] Conclusion of Law No. 3.

All those parts of the record designated in the "Designation of Portions of Record on Appeal" are necessary in connection with the consideration of each of these points.

Respectfully submitted,

HART, SPENCER, McCULLOCH
and ROCKWOOD
PHILIP CHIPMAN,
R. W. MAXWELL,
Attorneys for Defendant-
Appellant.

State of Ore.
County of Mult.—ss.

Due service of the within Statement is hereby accepted at Portland, Oregon, this 20th day of Jan., 1942 by receiving a copy thereof, duly certified to as such by Chipman of attorneys for Defendant.

JAMES LANDYE
Attorney for Plaintiff.

[Endorsed]: Filed January 21, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [76]

And Afterwards, to wit, on the 22nd day of January, 1942, there was duly filed in said Court, a Notice by Plaintiff of Cross Appeal in words and figures as follows, to wit: [77]

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

Notice is hereby given that Ivan Womack, plaintiff above named, hereby cross appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered herein on January 8, 1942.

Dated this 22nd day of January, 1942.

GREEN & LANDYE
Attorneys for Ivan Womack
1003 Corbett Building
Portland, Oregon

Service of the foregoing notice of cross appeal is hereby accepted this 22nd day of January, 1942.

HART, SPENCER, McCULLOCH & ROCKWOOD
PHILIP CHIPMAN
Attorneys for Defendant-Appellant.

[Endorsed]: Filed January 22, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [78]

And Afterwards, to wit, on the 22nd day of January, 1942, there was duly Filed in said Court, a Bond for Costs on Cross Appeal in words and figures as follows, to wit: [79]

[Title of District Court and Cause.]

COST BOND ON CROSS APPEAL
4529976

Whereas, Ivan Womack, the plaintiff above named, recovered a judgment against the Consolidated Timber Company, a corporation, defendant above named, for the sum of Seven Hundred Fifteen and 72/100 ($715.72) Dollars in a civil action tried before the Honorable James Alger Fee, a Judge in and for the above entitled Court, and judgment having been rendered on the 8th day of January, 1942; and,

Whereas, Ivan Womack, plaintiff, has filed notice of appeal from the said judgment as cross appellant to the United States Circuit Court of Appeals for the 9th Circuit;

Now, Therefore, Ivan Womack, plaintiff and cross appellant, as principal, and the Fidelity and Deposit Company of Maryland, a corporation, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the Act of Congress of August 13th, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereunder," as surety, undertake that said cross appellant will pay all costs and disbursements which may be awarded against him on said cross appeal, and that said cross appellant will satisfy any judgment for costs which may be given against him in the appellate court on appeal.

In Witness Whereof, the said principal and surety have executed this bond on the 22nd day of January, 1942.

IVAN WOMACK
GREEN & LANDYE
By GREEN & LANDYE,
JAMES LANDYE
His Attorney
Principal.

(Seal) FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
By CLARENCE D. PORTER
Its Attorney-in-Fact
Surety.

The foregoing bond on cross appeal is hereby approved.

.....

United States District Judge.

[Endorsed]: Filed January 22, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [80]

And Afterwards, to wit, on the 22nd day of January, 1942, there was duly Filed in said Court, a Statement of Points on which cross-appellant will rely, in words and figures as follows, to wit: [81]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH RESPONDENT INTENDS TO RELY ON CROSS APPEAL.

Comes now Ivan Womack, plaintiff-respondent herein, and makes this his statement of points upon which he intends to rely on the cross appeal of this case to the United States Circuit Court of Appeals for the Ninth Circuit.

Point I.

The cookhouse at Glenwood is not a retail or service establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., sec. 213), and the provisions of sections 6 and 7 of the Fair Labor Standards Act therefore do apply to plaintiff and the

assignors of plaintiff for work performed by them at the cookhouse at Glenwood.

The District Court therefore erred in making a finding that the cookhouse at Glenwood is a retail or service establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., sec. 213), and the provisions of sections 6 and 7 of the Fair Labor Standards Act therefore do not apply to plaintiff and the assignors of plaintiff for work performed by them at the cookhouse at Glenwood.

All those parts of the record designated in the "Joint Designation of Portions of Record on Appeal" are necessary in connection with the consideration of each of these points.

Respectfully submitted

GREEN & LANDYE

Attorneys for Plaintiff-Respondent.

Service of the foregoing statement of points is hereby accepted this 22nd day of January, 1942.

HART, SPENCER, McCULLOCH & ROCKWOOD

Attorneys for Defendant-Appellant.

[Endorsed]: Filed January 22, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [82]

And Afterwards, to wit, on the 23rd day of January, 1942, there was duly Filed in said Court, a Joint Designation of Contents of the Record, in words and figures as follows, to wit: [83]

[Title of District Court and Cause.]

JOINT DESIGNATION OF PORTIONS OF RECORD ON APPEAL

To George H. Marsh, Esquire, Clerk of the above entitled court:

The defendant-appellant and plaintiff-cross appellant hereby jointly make this their designation of the portions of the record desired on appeal.

1. Complaint. From which may be omitted Exhibits A to E inclusive.
2. Answer.
3. Pre-trial Order. To which should be attached Exhibit 7.
4. Opinion of Judge Fee (omitting Pre-trial Order).
5. Findings of Fact and Conclusions of Law, omitting exhibits annexed thereto.
6. Judgment.
7. Defendant's Notice of Appeal.
8. Defendant's Bond on Appeal.
9. Plaintiff's Notice of Cross Appeal.
10. Plaintiff's Bond on Cross Appeal.
11. Condensed Statement of Testimony.
12. Defendant's Statement of Points on Appeal.
13. Plaintiff's Statement of Points on Cross Appeal.

Except as indicated above, none of the testimony nor exhibits need be included in the record. [84]

Respectfully submitted,

HART, SPENCER, McCULLOCH & ROCKWOOD
PHILIP CHIPMAN
ROBERT W. MAXWELL
Attorneys for Consolidated Timber Company, Defendant-Appellant.

GREEN & LANDYE
Attorneys for Ivan Womack,: Plaintiff-Cross Appellant.

[Endorsed]: Filed January 23, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [85]

And Afterwards, to wit, on the 23rd day of January, 1942, there was duly Filed in said Court, a Condensed Statement of Testimony in words and figures as follows, to wit: [86]

CONDENSED STATEMENT OF TESTIMONY

IVAN WOMACK,

plaintiff herein, testified in substance as follows:

Plaintiff is employed by defendant, Consolidated Timber Company. He is at present employed in the cookhouse known as Camp 2, which is located on a hill seventeen miles from Glenwood. The cookhouse is one large building where food is prepared for the

(Testimony of Ivan Womack.)

men and the bunkhouses are on the sidehill approximately 100 or 150 feet from the cookhouse. Adjoining buildings are power plant and supply house.

Breakfast is served to the men and they eat it at the cookhouse. Lunches are furnished them but they take them with them. Supper is served at the cookhouse.

Plaintiff has worked for Consolidated Timber Company since October, 1937. Prior to June 28, 1940, he was employed at the cookhouse at Glenwood. Glenwood is about thirteen miles west of Forest Grove. There is a postoffice at Glenwood. There are family houses about two miles from the Consolidated camp.

The only way to get from Glenwood to Camp 2 is by train or speeder. There is no road to Camp 2. The trip takes about an hour and fifteen minutes.

At the Camp 2 operation the cookhouse is used mostly by the Consolidated crew. Sometimes they run in a few gyppo crews for convenience.

Around Glenwood there are no other eating facilities. In August or September Mr. McCutcheon put in at the postoffice what the witness would call a hot dog or sandwich place for the transient trade, and he serves ice cream and sandwiches and hot coffee, and he has approximately half a dozen stools. This was [87] done in August of 1940.

(Testimony of Ivan Womack.)

Witness is a member of Local 5, C. I. O.

Cross Examination

The cookhouse at Glenwood is still being operated and is being used, but the witness could not say it was being operated by the Company "due to a deal with the union."

TESTIMONY FOR DEFENDANT

LLOYD R. CROSBY

testified for the defendant as follows:

He is manager of Consolidated Timber Company and has been since its operations were started in 1934.

Asked to describe what buildings and industries are located at Glenwood, Mr. Crosby stated that at Glenwood there is the Glenwood Lumber Company, a sawmill in which defendant has no interest, the Wasser-Mowatt Shingle Company, a shingle mill in which defendant has no interest, and the defendant. Each of the industries has buildings. The defendant maintains an office building, a bath house, cookhouse building, several bunkhouses, machine shop and car shop. In addition there are about 50 residences around there.

Defendant operated its cookhouse at Glenwood from 1934 up until about August, 1940. During that period the cookhouse was used by others than employees of defendant. A majority of defend-

(Testimony of Lloyd R. Crosby.)

ant's employees never ate at the cookhouse. A majority of them ate at home; many of them lived near Glenwood; many of them at Forest Grove; some at West Timber; some at Hillsboro and some at Vernonia. Most of the unmarried employees and some of the married ones used the cookhouse. There were no other cookhouses operated at Glenwood, but at West Timber there were boarding houses and at Forest Grove there were boarding houses. Maintenance of the cookhouse at Glenwood was for convenience and not as a necessity for the operations of the defendant as the logging operations could have been carried on without [88] maintaining a cookhouse.

Cross Examination

At Glenwood the defendant has fed a considerable number of "gyppo" operators. The term "gyppo" generally refers to a small logging company. The gyppos were under contract with defendant. The defendant paid their pay rolls only when they didn't have enough money to pay them themselves.

At various times there was no cookhouse at Glenwood. The witness thinks it is fair to presume that if over half of the employees preferred not to live there he could have a crew in which nobody lived there. There has never been a time when the witness could not have employed men who preferred to live at home rather than at the camp. Thereupon the following occurred:

(Testimony of Lloyd R. Crosby.)

"Q. In other words, what you mean is then that if you laid off all the men who lived in Portland and other places and hired local people possibly they could have all lived around there?

A. No. That could be done, but we never wanted to do anything like that. We thought we had men working there who were good employees, and for their convenience we preferred to run a cookhouse so that they could stay there and avail themselves of the work if they wanted to. Nobody had to, in fact a lot of single men boarded with private families or some place rather than pay board to the company."

If the company had not operated a cookhouse many of the employees could have stayed at West Timber, as many of them did. Many could have stayed at Forest Grove, as many did. There is room in the community for 110 men. West Timber is about nine miles from Glenwood. Forest Grove is about thirteen miles from Glenwood.

At one time the company contracted the cookhouse to an independent contractor, but some of the men thought the contractor was making too much money (which he wasn't) and the defendant took over the cookhouse from the contractor, but there has never been a time when we haven't had people wanting to come in and put a [89] restaurant in the camp. Defendant chose not to allow them to do it but there have been many applications.

(Testimony of Lloyd R. Crosby.)

The cookhouse at Glenwood is operating now but not by defendant. A private individual is running it with an agreement with the union.

The agreement with the union provides that the cookhouse shall be self-supporting and that the men will pay enough for board to compensate the company for the cost. Apparently the union does not believe the figures we give them for cost, and so rather than guarantee to pay the cost they want the company to run it and take the loss. The witness requested the union to guarantee the cost of running the cookhouse and the company would supply certain things free. The union could pay the cookhouse employees such rates as it wanted to. The union, however, refused the proposition.

As far as the cookhouse at Camp 2 is concerned, the witness knows of no employees who do not eat at the cookhouse. Two or three from up there go back and forth on the speeder. All of the others eat at the cookhouse. It is necessary to have a cookhouse at Camp 2, whether run by the defendant or by somebody else. The Company would prefer to have somebody else run it but the union objects to it.

Redirect Examination

The cookhouse at Glenwood is being operated by a member of the union who runs the cookhouse on his own hook. The company charges him a dollar a month rent for the facilities and he runs the cookhouse and whatever profit he makes, if any, is his. It is run as a private enterprise.

(Testimony of Lloyd R. Crosby.)

As for other eating facilities near Camp 2, there is another camp about two miles from Camp 2 and there is a boarding [90] house there and anyone who wants to can go there and board. As far as the witness knows none of the employees at Camp 2 go over there. That cookhouse is being operated as an independent enterprise similar to the present operations at Glenwood, or so the witness understands.

REBUTTAL

EDWARD McSORLEY

testified for the plaintiff as follows:

Witness is business agent for Local No. 5 of the I. W. A., affiliated with the C. I. O. In the opinion of the witness it is necessary to have a cookhouse at Glenwood in order for defendant to operate.

[Endorsed]: Filed Jan. 23, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [91]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 91, inclusive, constitute the transcript of record on appeal from a Decree of said Court, in a cause therein numbered Civil 522, in which Ivan Womack

is plaintiff, appellee, and cross-appellant, and the Consolidated Timber Company, a corporation, is defendant, appellant, and cross-appellee; that said transcript has been prepared by me in accordance with the joint designation filed by said appellants and rules of court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appears of record and on file at my office and in my custody, prepared in accordance with the said designation and rules of Court.

I further certify that the cost of the foregoing transcript is $17.15, and that the same has been paid by said appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 3d day of February, 1942.

(Seal) G. H. MARSH,
Clerk. [92]

[Endorsed]: No. 10048. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Timber Company, a corporation, Appellant, vs. Ivan Womack, Appellee. Ivan Womack, Appellant, vs. Consolidated Timber Company, a corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed February 9, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10048

CONSOLIDATED TIMBER COMPANY,
a corporation,

Appellant,

vs.

IVAN WOMACK,

Appellee.

IVAN WOMACK,

Cross Appellant,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Cross Appellee.

STIPULATION

The parties to this appeal hereby stipulate as follows:

1. Appellant's statement of points to be relied on on appeal as filed in the United States District Court shall stand as the statement of points in the United States Circuit Court of Appeals.

2. Cross Appellant's statement of points to be relied on on appeal as filed in the United States District Court shall stand as the statement of points in the United States Circuit Court of Appeals.

3. The entire record as designated and certified by the United States District Court shall be printed.

Dated at Portland, Oregon, this 2d day of February, 1942.

HART, SPENCER, McCULLOCH & ROCKWOOD
PHILIP CHIPMAN
R. W. MAXWELL
Attorneys for Consolidated Timber Company, Appellant and Cross Appellee.
GREEN & LANDYE
Attorneys for Ivan Womack, Appellee and Cross Appellant

[Endorsed]: Filed Feb. 9, 1942. Paul P. O'Brien, Clerk.